

# REVIEWS

SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE. By Peter F. Coogan, William E. Hogan and Detlev F. Vagts. Albany: Matthew Bender & Co., 1963. Vol. I (ch. I-XIII) ; Vol. II (in press) (ch. XIV-XX). \$66.00 for the set of two volumes.

MR. Coogan and his colleagues have brought together in the volumes under review a comprehensive, incisive, and insightful collection of critical commentaries on Article 9 of the Uniform Commercial Code. As of their publication dates, these volumes become the essential source of knowledge for beginning student, law professor, practitioner, and judge. During the past few years more than one "treatise" on Article 9 has been rushed into print. These unhappy productions may now, with the appearance of *Coogan on Secured Transactions*, be relegated to the obscurity which they so richly deserve.

I use the phrase a "collection of critical commentaries." By way of explanation, the point should be made that the book is rather a collection of essays about Article 9 than an integrated treatise. Most of the twenty chapters first appeared as law review articles. In their translation from "articles" into "chapters," much labor went into revision, so that the end result is a good deal more — and more impressive — than a collection of reprints. The law review origins serve, however, to explain a certain amount of repetitious matter: a law review article is, or should be, a self-contained whole in a way that a chapter in a book need not be. Thus the cover-to-cover reader may find himself occasionally going over something that has already been explained elsewhere. On the other hand, the chapter-by-chapter reader benefits from having the whole thing in a nutshell, and will happily forego the usual shuttling back and forth as he runs down the elusive *supras* and the enigmatic *infras*. Since we may assume that the number of cover-to-cover readers of a large two-volume work is limited, the occasional duplication is a cheap price to pay for the blessed deliverance from a highly developed system of cross-references.

In addition to Mr. Coogan, seven other contributors are listed — three law professors and four practicing lawyers. (Mr. Coogan himself defies categorization: a partner in the Boston firm of Ropes and Gray, he also teaches at both the Yale and the Harvard Law Schools. Whether he should be described as a professing practitioner or a practicing professor must sometimes be a puzzle even to himself.) The multiplicity of authors has, of course, both its advantages and its drawbacks. The range of reference is immensely broadened: eight heads are not necessarily better than one head, but collectively they know a great deal more. There is also much to be said for the richness induced by collaboration and for the presentation of contrasting points of view. The danger is that too many cooks will produce at best a potpourri. That danger here is

kept well under control. Mr. Coogan appears as sole author or as a collaborator in thirteen of the twenty chapters and several of his colleagues won their Article 9 spurs under his guidance, professorial or otherwise.

The book begins with a series of chapters, all by Mr. Coogan alone or with collaborators, which are in essence overviews of Article 9. A poet once proposed thirteen ways of looking at a blackbird: Mr. Coogan proposes five ways of looking at Article 9. Next is a two-part chapter on filing: Mr. Coogan contributes a discussion of "notice filing" under Article 9 and its predecessor statutes; Mr. Haydock examines the criteria for the place of filing under Article 9. While this material is undeniably useful, it is probably true that not even God could make the mechanics of a filing system interesting. Another two-part chapter, both parts by Mr. Coogan, analyzes the so-called "floating lien" which Article 9 is said to validate and considers its relationship to the scheme of priorities which the Article establishes. Mr. Coogan's wise advice to the lawyer who is thinking of taking advantage of the floating lien provisions is: *Don't!* Professor Hogan of Cornell contributes a useful chapter on default, which is followed by two excellent discussions of the status of the Article 9 security interest in bankruptcy: Mr. Coogan and Professor Vagts of Harvard set the stage with a general discussion of the secured creditor and the Bankruptcy Act; Professor Kennedy of Michigan, one of the country's leading bankruptcy authorities, goes into expert detail on the powers of the trustee in bankruptcy. The problems raised by the interaction between the Article 9 security interest in after-acquired property and Section 60 of the Bankruptcy Act on voidable preferences are then examined by Mr. Gordon in a technical and occasionally tendentious analysis. (An illustration of the book's presentation of contrasting viewpoints is afforded by a preliminary note to this chapter which apprises the reader that Mr. Gordon's approach is "at some points in conflict with" the approach to comparable problems taken in another chapter.) The immensely complicated and controversial question of the priority of federal tax liens over consensual security interests is dealt with in a chapter by Mr. Coogan and Mr. Mansfield: this problem, which was revealed for the first time by the Supreme Court's off-handed *per curiam* decision in *United States v. Ball Construction Co.*,<sup>1</sup> has already become a major storm center and promises to continue to create trouble in the predictable absence of congressional action. The first volume concludes with a study by Mr. Coogan and Mr. Bok of the impact of Article 9 on the corporate indenture; this is the only serious discussion which has yet been given to the Article 9 provisions (which were drafted with the problems of short-term financing arrangements principally present in the minds of the draftsmen) as they affect long-term arrangements. The focus of the seven chapters which are to make up Volume II<sup>2</sup> is the elaborate structure of the Article 9 priority provisions. Professor Vagts considers the specialized problems involved in the pledge of corporate secu-

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1. 355 U.S. 587 (1958).

2. At the moment of writing this review Volume 2 is still in press. Mr. Coogan and the publishers have kindly furnished me with galley proofs of the relevant chapters.

rities. A sequence of three chapters is then devoted to Mr. Coogan's highly original and extremely important analyses of several related aspects of priority disputes: chapter 15 (with Mr. Gordon) deals with receivables financing; chapter 16 (with Mr. Clovis) is a general study of the relationship between the Code and the law of real property; against that background Mr. Coogan proceeds in chapter 17 to a detailed study of the vexed problem of fixtures. Three chapters by Professor Hogan conclude the volume: chapter 18 is an analysis of the not-too-happy marriage of sales and security law under the Code; chapter 19 takes up the concept of the purchase money security interest; chapter 20 is a helpful summary of state Retail Instalment Sales Acts and their relationship with Article 9.

The publishers have bound the volumes in loose-leaf format, leaving sixty-page gaps in the pagination between each chapter. Thus the book will be able to grow with the times as new chapters are added and existing chapters are revised.

## II

The great bulk of the enormous literature about the Code has been polemics and propaganda. With the appearance of *Coogan on Secured Transactions* it may be hoped that Code criticism has come of age.

There was a period in the mid-1950's when it appeared that the Code was dead. What purported to be the "final draft" of the Code was promulgated in 1952. Pennsylvania promptly enacted the 1952 version, but no other state followed it. In 1953 the New York Law Revision Commission undertook an elaborate study of the Code. The Commission's final report (1956) concluded that the Code "is not satisfactory in its present form and cannot be made satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable."

During the course of the Commission's study, the sponsors of the Code set up subcommittees to revise the several articles of the Code in the light of criticisms received from the Commission and from other sources. From this process there emerged the 1957 draft of the Code, which incorporated hundreds of amendments to the 1952 text. Subsequently a few further amendments were approved and new "official texts" of the Code were issued in 1958 and 1962. At no time, however, did the sponsors undertake the "comprehensive re-examination and revision" of the Code which the Law Revision Commission had called for. The amendments were made *ad hoc* and *ad hominem* by subcommittees working in isolation from each other. Overall control of a sort was exercised by a high-level Editorial Board, which passed on questions of policy but was not itself equipped to be a drafting group. After 1952 there was nothing that could be described as a drafting staff for the Code as a whole.

New York's rejection of the Code in 1956 seemed to be the end. That it was not the end was entirely due to the devoted labors of a group of Massachusetts lawyers, among whom Mr. Coogan was a leading figure. The Massachusetts legislature was persuaded to enact the Code in 1957. Kentucky followed in

1958, Connecticut in 1959, and the log-jam was broken. As of the present time thirty states (including New York) have become Code states; the remaining states will no doubt follow suit within a few years.

After their narrow escape in 1956 the sponsors of the Code seemed to become, understandably, gun-shy. The principal order of business was to get the Code enacted everywhere as soon as possible. As a matter of public relations, it was easier to present the Code as perfect — or practically perfect — than to present it as a good statute which could stand improvement. After 1957 no further amendments were made except under the strongest political pressure.

The Code as we have it today is essentially the 1952 Code as it has emerged from a ten year job of tinkering. Undoubtedly a fundamental mistake was made in 1952 when an imperfect draft was suddenly dubbed "final"; the New York Law Revision Commission was quite right in saying that a comprehensive revision was needed. There has never been such a revision, and the process of amending the 1952 draft into political acceptability has been carried out in the worst possible manner. Many of the amendments were useful; a few were ill-advised; some were silly. However, the section-by-section approach to drafting amendments in response to specific criticisms merely made the eventual necessity of a revision of the Code as a whole more urgent.

Mr. Coogan has proved his devotion to the Code. He participated in the drafting. He was instrumental in securing the Code's enactment in Massachusetts. He has effectively supported it in many other states. He has given up a great deal of time (having apparently mastered the secret of the forty-eight hour day) to the education of the bar through institutes, seminars, and the like in all parts of the country.

Mr. Coogan has not, however, conceived it to be his duty to act as an apologist for the Code. Nor does he believe that the way to deal with hard problems is to sweep them under the rug. In the law review articles which have become chapters of his book, he was the first commentator to draw attention to a number of serious problems to which Article 9 returns no answer or a wrong answer or a doubtful answer. As examples of his probing analysis, the reader may be referred to the studies of receivables financing (chapter 15) and of priorities in fixtures (chapters 16 and 17). Mr. Coogan is no peddler of easy answers to hard questions. He gives no aid and comfort to those who want to have things made simple. He is a rigorous taskmaster, at his best when the going is tough. Mr. Coogan appears to believe that Article 9 is a soundly conceived statute. It works, and works a great deal better than the pre-Code law ever did. Analysis and experience have revealed mistakes and ambiguities which can be, and ought to be, corrected — not by a piecemeal tinkering, but by a thoughtful reconsideration of the entire Article. Mr. Coogan is not one to suggest that all the hard problems would then go away and that security law could be mastered without sweat and tears. Given the complexity of the underlying transactions, the law in this area will always be difficult enough to satisfy the most Socratic of law professors.

It is in a way unfortunate that Mr. Coogan has so far directed his remarkable talents exclusively to the study of the Code's treatment of security transactions under Article 9. With the exception of a recent article in this *Journal*,<sup>3</sup> it is hard to think of any responsible commentary which has approached other Articles of the Code with the rigor of analysis and the depth of perception which mark Mr. Coogan's work on Article 9. The casual observer might conclude that the emergence of the Article 9 higher criticism, while the rest of the Code is untouched except for an occasional eulogy, must mean that the same draftsmen who repeatedly demonstrated their human fallibility in Article 9 were divinely inspired in all the other Articles. My own experience in teaching the Articles on Sales, Commercial Paper, and Bank Collections leaves me somewhat skeptical of the pervasiveness of divine inspiration in any part of the Code, and Professor Peters, in the article referred to, has ably demonstrated the existence of booby-traps and pitfalls in Article 2 which are quite as bloodcurdling as any of Mr. Coogan's Article 9 horrors.

### III

Was the Code, then, so much worse drafted than its predecessor statutes? Were the N.I.L. and the Uniform Sales Act successes while the Code is a failure? Not in the least. There are several reasons why the Code should be in urgent need of a general revision. One reason has already been referred to: the mistake which was made in 1952 in declaring an unfinished Code complete, which was compounded by the subsequent, and even more serious, mistake in handling the process of amendment which the original mistake had made necessary. But there are other reasons of a more fundamental order.

Between 1900 and 1950 this country went off the common law standard, to which we shall never return. In the area of commercial law there had been few statutory encroachments at the time when the National Conference of Commissioners undertook the drafting of the first Uniform Acts. Statutes such as the Uniform Sales Act were drafted in terms of broad and vague generality: it is not much of an exaggeration to say that the law of sales continued to be common law quite as much after the "codification" as before. During the ensuing half century an intricate network of statutes, uniform and non-uniform, was built up which, gradually but inevitably, choked off the possibility of further common law growth. The statutes themselves tended to become tighter in their drafting, more detailed in their provisions. Along with these developments went a change in the traditional American attitude toward statutory law; it is hardly too much to say that, in the course of a generation, we stopped being common law lawyers and became statute lawyers.<sup>4</sup>

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3. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).

4. See, for further development of some of these ideas, Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

It was not changes in business practice between 1900 and 1950 that made the Code necessary. It was the need to impose some order on the uncontrolled piling up of uncoordinated, overlapping, and contradictory statutes.

The Code was the most ambitious statutory project which has ever been undertaken in this country. It was, naturally enough, drafted in the currently fashionable style: that is, it was tight, detailed, specific, rigid. The chief Reporter, Karl Llewellyn, may have had other ideas: a man who added an acute sense of history to a vast store of learning, he struggled to keep his Code loose and general. He had clearly in mind the idea of a "case law Code" — one whose essential function was to clear away the accumulated underbrush of the past, while leaving the way open for a free future growth. Other views, however, prevailed, particularly during the post-1952 period of amendment, in which Professor Llewellyn took little part.<sup>5</sup> The philosophy of the amenders was to batten down all the hatches.

We are coming into a period in which changes in the law will be made less and less through judicial adaptation and improvisation, more and more through statutory amendment and revision. We are painfully coming to learn that cities, once built, must be continually rebuilt. In the same way, our statutes and our codes, once drafted, must be continually redrafted. Fifty years ago the National Conference of Commissioners could launch a new Uniform Act and then forget about it for a generation. Today that cannot, in all decency, be done.

The Code will be amended. The only question is whether the process will be carried out wisely or, as has so far been the case, improvidently. State variations from the "official" text of the Code are already becoming — as in California — a serious threat to any idea of national uniformity. The refusal of the sponsoring organizations to consider ways and means of dealing with the problem does nothing to discourage eccentric and usually ill-informed action by individual states.

Ideally, a body should be established whose function would be to carry on a continuing study of the Code, for the purpose of proposing necessary amendments at five or ten year intervals. It is vital that the amendatory process, if the Code is not to be enacted federally, be somehow centralized and kept under control; perhaps the states which enact the Code could adhere to such a revisory body through an interstate compact. It is also vital that the revisors accept the idea that amendment and revision are not merely confessions of past error, to be hushed up; they are the conditions of a dynamic growth in the largely codified law of the second half of this century.

With respect to a revision of Article 9, Mr. Coogan's admirable volumes indicate the appropriate starting point. For this as well as for their inherent excellence, we are much in his debt.

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5. See Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813 (1962).

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